

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANA ISABEL PINEDA; SANTIAGO	)	Case No. 12-0998-SC
SALVADOR NORIO,	)	
	)	ORDER DENYING MOTION TO REMAND
Plaintiffs,	)	<u>AND GRANTING MOTION TO DISMISS</u>
	)	
v.	)	
	)	
CITIMORTGAGE, INC.; and DOES 1	)	
through 20, inclusive,	)	
	)	
Defendants.	)	

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**I. INTRODUCTION**

Plaintiffs Ana Isabel Pineda ("Pineda") and Santiago Salvador Norio (collectively, "Plaintiffs") filed this action in California Superior Court in connection with the threatened foreclosure of their home. Plaintiffs allege that Defendant CitiMortgage, Inc. ("Defendant") violated various California laws when it refused to offer Plaintiffs a permanent loan modification. After the action was filed, Defendant removed it to federal court. Now Plaintiffs move to remand the case back to state court and Defendant moves to dismiss the action in its entirety. ECF Nos. 13 ("MTR"), 22 ("MTD"). These motions are fully briefed. ECF Nos. 19 ("MTR Opp'n"), 20 ("MTR Reply"), 24 ("MTD Opp'n"), 26 ("MTD Reply"). The Court finds these matters appropriate for disposition without oral argument. As detailed below, the Court DENIES Plaintiffs' Motion to Remand and GRANTS Defendant's Motion to Dismiss.

## II. BACKGROUND

According to the Complaint Plaintiffs filed in state court, Defendant is a New York corporation which maintains offices in California and Plaintiffs are residents of San Francisco, California. ECF No. 1 ("Not. of Removal") Ex. 1 ("Compl."). The First Amended Complaint, which was filed in federal court and is substantially similar to the Complaint, alleges that Plaintiffs obtained a \$417,000 loan from Defendant to refinance their San Francisco home in January 2008. ECF Nos. 14 ("FAC") ¶ 15; 23 ("RJN") Ex. H.

Plaintiffs' claims arise from their attempt to obtain a loan modification from Defendant. Plaintiffs allege that, on December 1, 2009, they entered into a Home Affordable Modification Trial Period Plan ("the Plan") that required Defendant to provide them with a loan modification so long as certain conditions were met. FAC ¶ 16. The Court takes judicial notice of the Plan, which is attached to Defendant's Request for Judicial Notice.<sup>1</sup> RJN Ex. A ("Plan"). It is unclear whether Defendant executed the Plan as it is only signed and dated by Pineda. See id.

The Plan required Plaintiffs to make three trial period payments of \$1,200 in late 2009 and early 2010. Id. § 2. The Plan states: "If I [Pineda] am in compliance with this Trial Period Plan . . . then my lender [Defendant] will provide me with a Home Affordable Modification Agreement." Id. § 1. As Defendant points

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<sup>1</sup> Plaintiffs state the Plan is attached to the FAC as Exhibit A, FAC ¶ 16, but they filed no such exhibit with the Court. The Court may take judicial notice of the Plan since Plaintiffs' claims depend on its contents and the parties do not dispute its authenticity. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

1 out, the Plan did not offer a guarantee of a loan modification.  
2 Section 2.F of the Plan provides: "If[, ] prior to the Modification  
3 Effective Date, . . . the Lender does not provide me with a fully  
4 executed copy of this Plan and the Modification Agreement . . . the  
5 Loan Documents will not be modified and this plan will terminate."  
6 Id. § 2.F. Similarly, Section 2.G provides:

7 [T]his Plan is not a modification of the Loan Documents  
8 and [ ] the Loan Documents will not be modified unless and  
9 until (i) I meet all of the conditions required for  
10 modification, (ii) I receive a fully executed copy of a  
11 Modification Agreement, and (iii) the Modification  
12 Effective Date has passed. . . . [T]he Lender will not be  
13 obligated or bound to make any modification of the Loan  
14 Documents if the Lender determines that I do not qualify  
15 or if I fail to meet any one of the requirements under  
16 this Plan.

14 Id. § 2.G.

15 Plaintiffs allege that they satisfied their obligations under  
16 the terms of the Plan by making the three required monthly  
17 payments, along with another seven payments later demanded by  
18 Defendant; submitting the required documents; and following  
19 Defendant's directions. FAC ¶¶ 20, 27. Plaintiffs allege that  
20 Defendant breached the Plan by failing to provide them with a  
21 permanent loan modification as promised and agreed. Id. ¶ 23.

22 On September 30, 2010, Defendant's agent executed a Notice of  
23 Default and Election to Sell Under Deed of Trust. RJN Ex. K  
24 ("NOD"). According to the NOD, Plaintiffs were in arrears on their  
25 loan in the amount of \$23,427.80. Id. Plaintiffs dispute the  
26 accuracy of the NOD, alleging that they satisfied their obligations  
27 under the loan by tendering the monthly installments due under the  
28 Plan. FAC ¶ 30. On January 5, 2011, the substituted trustee on

1 the loan executed and recorded a Notice of Trustee's Sale. RJN Ex.  
2 L. That notice expired and another was executed and recorded on  
3 January 23, 2012. RJN Ex. M. The trustee's sale was scheduled for  
4 February 14, 2012. Id. According to the Notice of Removal, the  
5 trustee's sale proceeded as planned and Plaintiffs' property was  
6 sold for \$251,000. Not. of Removal ¶ 15. Plaintiffs, on the other  
7 hand, contend that the "the sale of the Subject Property has not  
8 taken place." MTD Opp'n at 5. The pleadings are silent on the  
9 matter and neither party has submitted evidence on the issue.<sup>2</sup>

10 On February 10, 2012, Plaintiffs filed the instant action in  
11 the Superior Court of the State of California in and for the County  
12 of San Francisco. The Complaint asserted five causes of action:  
13 (1) breach of contract; (2) promissory estoppel; (3) breach of the  
14 implied covenant of good faith and fair dealing; (4) violation of  
15 the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
16 Code § 17200 et seq.; and (5) fraud. Compl. ¶ 26-86. In their  
17 prayer, Plaintiffs sought compensatory damages, special damages,  
18 general damages, treble damages, and attorney's fees and cost.  
19 Compl. at 14. Plaintiffs also asked for a number of other  
20 remedies. As part of their breach of contract claim, Plaintiffs  
21 sought a judgment "commanding specific performance by Defendant  
22 CITI of the obligations set out in the [Plan]." Id. ¶ 36.  
23 Additionally, in their UCL claim, Plaintiffs sought "an Order of  
24 the Court declaring that the acts of [Defendant] alleged herein  
25 [sic] Plaintiffs and the Subject Property are fraudulent,

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26 <sup>2</sup> Whether the trustee's sale took place is ultimately irrelevant to  
27 the Court's decision here. Nevertheless, it is disturbing that one  
28 of the parties has misstated such a straightforward fact. The  
Court reminds the parties of their Rule 11 obligations. See Fed.  
R. Civ. P. 11(b)(3).

1 inequitable, [and] statutorily defective . . . and therefore void  
2 and without further effect." Id. ¶ 70.

3 On February 28, 2012, Defendant removed the action to federal  
4 court on diversity grounds. In its Notice of Removal, Defendant  
5 argues that the amount in controversy exceeds the \$75,000  
6 jurisdictional minimum because the loan encumbering Plaintiffs'  
7 property had a principal amount of \$417,000 and the property was  
8 sold for \$251,000. Not. of Removal ¶ 15. On March 28, 2012,  
9 Plaintiffs amended the Complaint and filed their Motion to Remand.  
10 The FAC asserts the same five causes of action as the initial  
11 Complaint, but the remedies sought are different. Unlike the  
12 Complaint, the FAC does not seek declaratory relief in connection  
13 with the alleged UCL violation. Defendant subsequently brought its  
14 Motion to Dismiss the FAC.

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16 **III. DISCUSSION**

17 **A. Plaintiffs' Motion to Remand**

18 A district court's subject matter jurisdiction is determined  
19 on the basis of the complaint at time of removal, not as  
20 subsequently amended. Sparta Surgical Corp. v. Nat'l Ass'n of Sec.  
21 Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998). Accordingly,  
22 the Court looks to the Complaint rather than the FAC to determine  
23 whether it may properly exercise subject matter jurisdiction.  
24 Defendant bears the burden of showing that the Court had  
25 jurisdiction from the outset -- in other words, that removal was  
26 proper. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).  
27 The Court "strictly construe[s] the removal statute against removal  
28 jurisdiction," and "federal jurisdiction must be rejected if there

1 is any doubt as to the right of removal in the first instance."

2 Id.

3 In this case, the relevant statutory provision is 28 U.S.C. §  
4 1332(a), which provides that district courts have diversity  
5 jurisdiction over all civil actions between "citizens of different  
6 States" where "the matter in controversy exceeds the sum or value  
7 of \$75,000, exclusive of interests and costs." Plaintiffs do not  
8 dispute that complete diversity of citizenship exists here, but  
9 argue that the amount in controversy requirement has not been met  
10 since no dollar amount appears on the face of the Complaint. MTR  
11 at 5.

12 Defendant bears the burden of showing by a preponderance of  
13 the evidence that more than \$75,000 is in controversy. See Singer  
14 v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir.  
15 1997). The Court finds that they have done so. "In actions  
16 seeking declaratory or injunctive relief, it is well established  
17 that the amount in controversy is measured by the value of the  
18 object of the litigation." Hunt v. Wash. State Apple Adver.  
19 Comm'n, 432 U.S. 333, 347 (1977). Where, as here, the purpose of  
20 an action is to halt or void the foreclosure of a property, then  
21 that property constitutes the object of the litigation. See  
22 Garfinkle v. Wells Fargo Bank, 483 F.2d 1074, 1076 (9th Cir. 1973).  
23 Plaintiffs' property more than meets the \$75,000 jurisdictional  
24 minimum. Plaintiffs refinanced the property for \$417,000 and the  
25 property was purportedly sold at a trustee's sale for \$251,000.  
26 See Not. of Removal ¶ 15.

27 Plaintiffs argue that amount in controversy should not be  
28 measured by the value of the property since they are not seeking

1 declaratory or injunctive relief. Plaintiffs' argument is belied  
2 by their own pleading. In the Complaint, Plaintiffs sought an  
3 order "declaring that the acts of [Defendant] alleged herein  
4 [regarding] Plaintiffs and the Subject Property are fraudulent,  
5 inequitable, statutorily defective and contrary to law, and  
6 therefore void and without further effect."<sup>3</sup> Compl. ¶ 70. In  
7 other words, Plaintiffs sought declaratory relief which would void  
8 Defendant's foreclosure proceedings. Plaintiffs also sought a  
9 judgment "commanding specific performance by Defendant [] of the  
10 obligations set forth in the [Plan]." Compl. ¶ 36. The Court  
11 could not possibly grant such relief without canceling the  
12 foreclosure proceedings and either voiding or enjoining the  
13 trustee's sale.

14 Thus, at least two claims asserted in the Complaint implicate  
15 Plaintiffs' right to the subject property. Because the value of  
16 that property exceeds the jurisdictional minimum, removal was  
17 proper. For these reasons, the Court DENIES Plaintiffs' Motion to  
18 Remand.

19 **B. Defendant's Motion to Dismiss**

20 As the Court finds that it may retain jurisdiction over this  
21 action, it turns to Defendant's Motion to Dismiss. A motion to  
22 dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the  
23 legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732  
24 (9th Cir. 2001). "Dismissal can be based on the lack of a  
25 cognizable legal theory or the absence of sufficient facts alleged

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26 <sup>3</sup> The fact that this language was removed from the FAC is  
27 irrelevant since subject matter jurisdiction is determined on the  
28 basis of the complaint at time of removal. See Sparta, 159 F.3d at  
1213.

1 under a cognizable legal theory." Balistreri v. Pacifica Police  
2 Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-  
3 pleaded factual allegations, a court should assume their veracity  
4 and then determine whether they plausibly give rise to an  
5 entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 664  
6 (2009). However, "the tenet that a court must accept as true all  
7 of the allegations contained in a complaint is inapplicable to  
8 legal conclusions. Threadbare recitals of the elements of a cause  
9 of action, supported by mere conclusory statements, do not  
10 suffice." Id. at 663. (citing Bell Atl. Corp. v. Twombly, 550 U.S.  
11 544, 555 (2007)).

12 Defendant argues that each of Plaintiffs' claims fail because  
13 the terms of the Plan did not guarantee Plaintiffs a permanent loan  
14 modification. MTD at 4-8. Plaintiffs respond that the Plan did  
15 make such a guarantee, pointing to Section 1, which states that  
16 "[i]f you [Plaintiffs] complete the trial period successfully, we  
17 [Defendant] will offer you a modification of your loan." Opp'n at  
18 7. Plaintiffs contend that they successfully completed the trial  
19 period by making the three monthly payments required by the Plan.  
20 Id.

21 The Court agrees with Defendant and finds that the Plan did  
22 not obligate Defendant to offer Plaintiffs a permanent loan  
23 modification. Plaintiffs' reading of the Plan completely ignores  
24 Section 2, which expressly states that: the Plan "is not a  
25 modification of the Loan"; "[Defendant] will not be obligated or  
26 bound to make any modification" if "[Defendant] determines that  
27 [Plaintiff] do[es] not qualify"; and the loan will not be modified  
28 if Defendant does not provide Plaintiffs with an executed



1 "Modification Agreement." Plan §§ 2.F-G. Thus, Defendant agreed  
2 to consider Plaintiffs' request for a loan modification, but it did  
3 not agree to provide one. Contrary to Plaintiffs' assertions,  
4 their tender of three \$1,200 loan payments did not obligate  
5 Defendant to provide a permanent loan modification. Other  
6 conditions needed to be satisfied, including the execution of a  
7 Modification Agreement. Plaintiffs have not alleged that this  
8 agreement was ever executed. Further, the Plan gave Defendant the  
9 discretion to determine whether Plaintiffs qualified for a loan  
10 modification. There is no indication that Defendant reached such a  
11 determination.

12 Accordingly, Plaintiffs cannot point to a statement or binding  
13 promise that could serve as the basis for any of their claims.  
14 Plaintiffs cannot state a claim for breach of contract since they  
15 fail to allege that Defendant promised to provide them with a  
16 permanent loan modification. Likewise, Plaintiffs cannot state a  
17 claim for promissory estoppel since they have not alleged a "clear  
18 and unambiguous promise." See US Ecology, Inc. v. State of  
19 California, 129 Cal. App. 4th 887, 901 (Cal. Ct. App. 2005). As to  
20 Plaintiffs' third claim, "the implied covenant [of good faith and  
21 fair dealing] will only be recognized to further the contract's  
22 purpose." Wolf v. Walt Disney Pictures & Television, 162 Cal. App.  
23 4th 1107, 1120 (Cal. Ct. App. 2008). Since there was no binding  
24 contract to provide a loan modification, there can be no breach of  
25 the implied covenant. The "deceptive business practice" that is  
26 the basis for Plaintiffs' UCL claim is Defendant's alleged refusal  
27 to honor the terms of the Plan and offer Plaintiffs a loan  
28 modification. See FAC ¶ 76. However, as the Plan did not require

1 Defendant to modify Plaintiffs' loan, this UCL claim cannot  
2 possibly succeed. Plaintiffs' fraud claim is also predicated on  
3 the allegation that Defendant made a "clear and unambiguous  
4 promise" to modify Plaintiffs' loan. Id. ¶ 88. This claim fails  
5 for the same reasons as the others.

6 As Defendant points out, other courts have reached the same  
7 conclusion when faced with practically identical trial period  
8 plans. See Grill v. BAC Home Loans Servicing LP, 10-CV-03057-FCD  
9 GGH, 2011 WL 127891, at \*4 (E.D. Cal. Jan. 14, 2011) ("[A] binding  
10 modification would not result unless and until [defendant]  
11 determined that plaintiff complied with the requirements."); Vida  
12 v. OneWest Bank, F.S.B., No. CIV. 10-987-AC, 2010 WL 5148473, at \*6  
13 (D. Or. Dec. 13, 2010) ("The Trial Period Plan is explicitly not an  
14 enforceable offer for loan modification."). Plaintiffs argue that  
15 this authority is distinguishable since the "borrowers in those  
16 cases . . . did not receive an executed permanent modification  
17 agreement." MTD Opp'n at 4. This is a similarity, not a  
18 distinction. There is no indication that Plaintiffs received an  
19 executed permanent modification agreement either.

20 For these reasons, the Court GRANTS Defendant's Motion to  
21 Dismiss. The Court finds that amendment would be futile since the  
22 agreement underlying Plaintiffs' claims clearly does not obligate  
23 Defendant to offer a loan modification. Accordingly, dismissal is  
24 WITH PREJUDICE.

#### 25 26 **IV. CONCLUSION**

27 For the reasons set forth above, the Court DENIES Plaintiffs  
28 Ana Isabel Pineda and Santiago Salvador Norio's Motion to Remand.

1 Further, the Court GRANTS Defendant CitiMortgage, Inc.'s Motion to  
2 Dismiss and DIMISSES WITH PREJUDICE Plaintiffs' claims in their  
3 entirety.

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5 IT IS SO ORDERED.

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7 Dated: June 8, 2012



8 UNITED STATES DISTRICT JUDGE  
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